Supreme Court, U.S.
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No. 93-421

In The

Supreme Court of the United States

October Term, 1993

P.T. EICHELBERGER, JR., M.D. and LOUIS B. HUGHES, M.D.,

Petitioners,

vs.

JULES BALETTE, M.D., *et al.*,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment allows a state to enforce a void judgment obtained without a trial setting or notice of the defendant.

2. Whether sanctioning a defendant for appealing an adverse judgment violates the First Amendment to the United States Constitution that prohibits the government from passing any law that restricts the rights of its citizens to petition those invested with the power of government for the redress of grievances.

PARTIES TO THE PROCEEDINGS

Petitioners are:

P. T. Eichelberger, Jr., M.D. and Louis B. Hughes, M.D.

Respondents are:

Jules Balette, M.D., Donald Chalmers, D.D.S., C.D. Delery, M.D., Clarence O. Dube, M.D., William H. Fagan, M.D., Eugene Fonteno, M.D., Charles Hill, M.D., Charles M. Howard, M.D., Glen E. Keller, M.D., Edward Roberson, M.D., E.O. Smith, M.D., individually and d/b/a Houston North Properties, a Texas Partnership.

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No.

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October Term, 1993

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Respondents.

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OPINIONS BELOW

The Supreme Court of Texas refused Petitioners' Application for Writ of Error on May 19, 1993. [*See* Appendix B, 3a]. The Texas Supreme Court overruled Petitioners' Motion for Rehearing on June 16, 1993. [*See* Appendix A, 1a].

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas affirming the trial court decision was reported in *Philip T. Eichelberger, Jr., M.D. and*

Louis B. Hughes, M.D. v. Jules Balette, et al., 841 S.W. 2d 508 (Tex. Ct. App. — Houston [14th Dist.] 1986). [*See* Appendix D, 7a].

The Court of Appeals overruled Petitioners' Motion for Rehearing on December 3, 1992. [*See* Appendix C, 5a]. The decision of the 334th District Court for Harris County dismissing with prejudice the petition for bill of review is unpublished. [*See* Appendix E, 16a].

STATEMENT OF JURISDICTION

Pursuant to Texas Rules Civil Procedure Rule 329b(f), Petitioners brought a bill of review in the 334th District Court of Harris County, Texas, seeking to vacate an interlocutory post answer default judgment entered against Petitioners by that court four years previously. Respondents filed special exceptions to the bill of review. After Petitioners amended the Petition for Bill of Review, Respondents filed a Motion to Dismiss alleging that Petitioners failed to comply with the court's orders by failing to file the cure to the special exceptions by March 8, 1993. Petitioners responded by stating the special exceptions order had been complied with and filed within the required 30 days, and that the Petition for Bill of Review satisfied the requirements stated by this Court in *Peralta v. Heights*, 485 U.S. 80 (1988).

Petitioners argued that the bill of review procedure, as it had been construed by the district court and as it applied to the facts of their case permitting a dismissal with prejudice, violated the due process and equal protection provisions of the Fourteenth Amendment and the law as stated by this Court in *Peralta, supra.*

Petitioners raised the same argument in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas arguing that a dismissal with prejudice and failure to follow case law violated Petitioners' rights under the Fourteenth Amendment. That the

Fourteenth Court of Appeals is confused about this case is clearly seen on the face sheet of their opinion, that the case before them is an appeal from the 295th District Court of Cause No. 85-26017. Petitioners perfected an appeal of the dismissal with prejudice of Cause No. 90-59762, their Petition for Bill of Review [Appendix E, 16a] of a Post Answer Judgment in Case No. 79-26873 [Appendix F, 17a]. The Post Answer Judgment was entered on November 17, 1986 by the 334th District Court while the case was in the 295th District Court with a trial date of February 9, 1987. [*See* Appendix G, H, I, J, 21a-36a). The Court of Appeals upheld the validity of the district court's actions, and in violation of the First Amendment of the United States Constitution sanctioned Petitioners for seeking to petition the courts for redress of the grievance. In Petitioners' Application for Writ of Error to the Supreme Court of Texas, Petitioners again argued that the district court's dismissal with prejudice of their Petition for Bill of Review that fully satisfied the *Peralta* requirements, to vacate a void judgment, failure to adhere to procedural rules and case law, and the appellate court's order of sanctions violated Petitioners' constitutional rights. The Supreme Court, on May 19, 1993, denied the Application for Writ of Error with the notation "Writ Denied" without an opinion.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

The state court decision contravenes this Court's precedents, under which a judgment entered without notice violates the Due Process Clause. *See Peralta v. Heights Medical Center, Inc.*, 108 S. Ct. 896 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 70 S. Ct. 652; *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187 (1965).

The state court decision contravenes this Court's precedents, under which a judgment obtained by fraud on the courts by officers

of the court is void. *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 245 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Section 1 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Rule 329(b)(f) of the Texas Rules of Civil Procedure provides:

> On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render a judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a previous

> judgment or order to be void because signed after the court's plenary power has expired.

Rule 161 of the Texas Rules of Civil Procedure provides:

> When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not so served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by statute. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liability, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered.

Rule 243 of the Texas Rules of Civil Procedure provides:

> If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket.

Rule 245 of the Texas Rules of Civil Procedure provides:

> The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of any time whether set or not, and may be set at any time for any other time.
>
> A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

Rule 247 of the Texas Rules of Civil Procedure provides:

> Every suit shall be tried when it is called, unless continued or postponed to a future day or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon the trial docket of the court shall be taken from the trial docket for the day set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

STATEMENT OF THE CASE

This case arises out of Petitioners' attempt to obtain relief from a post answer default judgment entered against them on November, 17, 1986, when the case had a trial date of February 9, 1987. [Appendix H, 32a].

During the period relevant to this appeal, Petitioners were general partners of Houston North Properties, a Texas general partnership. In 1985, Petitioners intervened in a lawsuit, No. 79-26873, filed by another general partner, Wentworth Eaton, against Houston North Properties and doctor partners Jules Balette, Donald Chalmers, C.D. Delery, Clarence O. Dube, William Fagan, Eugene Fontento, Charles Hill, Charles Howard, Glen Keller, Edward Roberson and E.O. Smith. Houston North Properties and partners filed a counterclaim based on fraudulent statements for legal fees of Houston North Properties. Because of Houston North Properties' refusal to cooperate in discovery and fast approaching trial date, Petitioners non-suited their claims. Trial on the counterclaim began on or about June 5, 1986 and ended in a mistrial in July, 1986.

On August 8, 1986, the 295th District Court, pursuant to Harris County local district court rules, granted Petitioners' motion for a temporary injunction and set a trial date for February 9, 1987 in Cause No. 79-26873.

On November 17, 1986, while the case was pending in the 295th District Court, the 334th District Court called the case to trial and rendered a post answer default judgment for $115,314.35 as damages based on the fraudulent fee statements and $475,000 in punitive damages. [Appendix F, 17a]. In derogation of Rule 245 of the Texas Rules of Civil Procedure, Drs. Eichelberger and Hughes were not informed prior to the new trial setting. In derogation of Rule 247 of the Texas Rules of Civil Procedure the cause was taken

from the trial docket for the date set without agreement of the parties or for good cause without motion or notice to Drs. Eichelberger and Hughes. In derogation of Rule 243 of the Texas Rules of Civil Procedure, Drs. Eichelberger and Hughes' demand for a jury trial was ignored, no writ of inquiry awarded and the case was not entered on the jury docket.

On November 5, 1990, Drs. Eichelberger and Hughes filed their original bill of review proceeding in the 334th Judicial District Court of Harris County, Texas. On March 11, 1991, they filed their first amended petition of review to cure the special exceptions granted by the district court. On May 31, 1991, without waiver of objection that the first amended petition fully complied with the *Peralta* requirements but in the exercise of due diligence, the doctors filed their second amended petition. In the proceeding, Doctors Eichelberger and Hughes contended that cause no. 79-26873 never had a trial date of November 17, 1986. The post answer default judgment contains an easily discernible fraudulent statement. The judgment contains the statement that the case is being called to trial pursuant to a setting in a temporary injunction granted on May 8, 1986. On May 6, 1986, the case was in the trial that began on April 5, 1986, and ended on July 11, 1986. Doctors Eichelberger and Hughes swear they never received notice of a new trial setting pursuant to T.R.C.P. Rule 245 or 247. They did not waive their right to a jury trial under Texas Const. Art. I, Section 19. In *Rogers v. Texas Commerce Bank-Reagan,* 755 S.W. 2d 83 (Texas 1988), the Texas Supreme Court held that a district court had no jurisdiction to hear a case at 9:30 a.m. on November 10 when the case was set for trial on November 10 at 11:00 a.m. The court found the decision of the court of appeals contrary to the Constitution and Texas Rules of Civil Procedure Rule 245, stating: "Our state constitution declares that no citizen of this state shall be deprived of . . . property . . . , except by the due course of the law of the land. Tex. Const. Art. I, Sec. 19. In addition Texas Rules of Civil Procedure 245 requires 'reasonable' notice of trial settings."

Although no longer required to show meritorious defenses after *Peralta,* Doctors Eichelberger and Hughes expressly stated that the counterclaims were based on fraudulent legal fees for Houston North Properties for suits in which Houston North Properties was not a party, the cases were non-suited or dismissed without prejudice.

In the bill of review proceedings, the trial court granted Houston North Properties and partners' motion to dismiss with prejudice. Houston North Properties alleged that Doctors Eichelberger and Hughes had failed to file an amended petition for the bill of review by March 8, 1991, and to serve two evasive partners as ordered by the court. The truth is that on February 8, 1991, the court granted Houston North Properties' special exception and required that Doctors Eichelberger and Hughes amend their petition within thirty days and serve the two evasive partners or they would be dismissed from the lawsuit. Thirty days expired not on March 8 but on March 11, 1991, the date Doctors Eichelberger and Hughes filed their amended petition. The Court of Appeals for the Fourteenth Supreme Judicial District of Texas affirmed the trial court decision and sanctioned Doctors Eichelberger and Hughes for appealing the dismissal. On May 19, 1993, the Texas Supreme Court refused Petitioners' Application for Writ of Error, with the notation "Writ denied", in effect approving of the Court of Appeals' decision but not satisfied that the opinion of the Court of Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the state as to require correction.

REASONS WHY THE PETITION FOR CERTIORARI AND REQUEST FOR SUMMARY REVERSAL SHOULD BE GRANTED

This appeal presents important questions concerning the constitutionality of certain aspects of Texas law as they relate to

obtaining and vacating post answer default judgments. More specifically, it raises the question of whether a state can condition relief from a judgment obtained without notice and a trial setting and by fraud on the courts to be heard only if the petition meets vague criteria of the district court and in total disregard for the requirements as set forth by this Court in *Peralta v. Heights Medical Center, Inc., supra* and *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 245 (1944). The federal rules, and the rules of other states, allow for the vacation of a void judgment, such as one obtained in violation of the due process rights of a party at any time. This case calls upon the Court to exercise its preeminent authority to guarantee that legislative and judicial pronouncements of the states conform with the Constitution and that law as it is interpreted by this Court.

A second question presented by this appeal is whether a court's numerous violations of procedures designed to protect the parties and insure fairness in the judicial forum constitutes a denial of due process. This Court recognized in *Eagles v. United States*, 329 U.S. 304, 314 (1946), that flagrant violations of procedural requirements which result in an unfair hearing can render the judgment subject to collateral attack. This case calls upon the Court to determine whether an appellate court's failure to require compliance with the supreme law of the land as interpreted by the United States Supreme Court, failure to require compliance with state rules of civil procedure and failure to issue opinions that are consistent with one another constitutes such error of sufficient severity to render the ensuing judgment void.

1. Doctors Eichelberger and Huges have always contended that not only were they never notified of a trial setting in Cause No. 79-26873 for November 17, 1986, but that there never was a trial setting in Cause No. 79-26873 for November 17, 1986. The statement in the judgment that the case is being called for trial pursuant to a setting in a temporary injunction granted on May 8, 1986, is false on its face. Cause No. 79-26873 never had a

temporary injunction granted on May 8, 1986. On May 8, 1986, Cause No. 79-26873 was in a trial that began April 5, 1986, and ended on July 11, 1986, in a mistrial. Houston North Properties has never produced one document showing a trial setting for November 17, 1986, in Cause No. 79-26873. Doctors Eichelberger and Hughes have produced a temporary injunction granted on August 8, 1986, with a trial setting of February 9, 1986. The First Appellate Court opinion documents Cause No. 79-26873 is pending in the 295th District Court on November 20, 1986. [Appendix G, 21a].

Texas law provides three methods for a direct attack on a default judgment:

1. Motion for new trial or other direct form of appeal, if filed within thirty days of the date of judgment;

2. Appeal by writ of error if filed within six months from the date of the default judgment; and

3. Petition for bill of review.

McEwen v. Harrison, 345 S.W. 2d 707, 710-711 (Tex. 1961).

Doctors Hughes and Eichelberger filed a motion for new trial that was granted on December 8, 1986. After granting a stay in the proceeding, on March 19, 1987, the First Court of Appeals vacated the order granting a new trial although an order granting a new trial is not reviewable on appeal as a matter of law. On March 19, 1987 the court also vacated the order of consolidation. [Appendix J, 35a].

Doctors Eichelberger and Hughes' appeal by writ of error was dismissed by the First Court of Appeals for want of jurisdiction. The court found that Doctors Eichelberger and Hughes had participated at the trial and therefore were not entitled to an appeal

by writ of error. The statement of facts relating to the proceeding clearly shows that Doctors Eichelberger and Hughes never participated at the trial in November, 1986. They did participate in the trial in June, 1986, that ended in mistrial. The judgment is a post answer default judgment.

As a result of the First Court of Appeals' actions, Doctors Eichelberger and Hughes have been forced to attack the post answer default judgment by bill of review. As a result of this Court's decision in *Peralta, supra,* a bill of review plaintiff must plead and prove the following elements:

> 1. That petitioner was prevented from proving his defense by the fraud, accident, or wrongful act of the opposing party [Doctors Eichelberger and Hughes produced uncontroverted evidence of fraudulent actions by Respondents, including false statements in the judgment];
>
> 2. There had been no fault or negligence on petitioner's part [Doctors Eichelberger and Hughes exercised extreme due diligence in securing a temporary injunction and a trial date of February 9, 1987, after the mistrial in July 1986]; or
>
> 3. Reliance on an official unmixed with fault or negligence on his own part [Doctors Eichelberger and Hughes relied on the orders and opinions of the 295th District Court (Appendix H, 30a; I, 33a; J, 35a) and the opinion of the First Court of Appeals that the case was in the 295th District Court (Appendix B, 21a)].

Doctors Eichelberger and Hughes provided proof of he elements as required. The district court and appellate court's imposition of some additional requirement based on a fraudulent statement that Petitioners had failed to cure special exceptions in a timely manner and to serve two evasive partners as a prerequisite

to vacating a void judgment cannot withstand constitutional scrutiny.

It is axiomatic that the Fourteenth Amendment forbids the exercise of the judicial power without notice to the defendant and an opportunity to be heard. *Pennover v. Neff,* 95 U.S. 714, 732-33 (1878). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Failure to give notice violates "the most rudimentary demands of due process of law." *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965).

Although Texas Rules of Civil Procedure Rule 245 expressly provides that the court can reset a contested case to a later date on any reasonable notice to the parties or by agreement of the parties, *the rule does not provide for the resetting of a contested case to an earlier date. See Rogers v. Texas, supra.*

Texas Rule of Civil Procedure Rule 247 mandates that no cause which has been set upon the trial docket of the court shall be taken from the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party. Respondents produced no document showing an agreement or notice to Doctors Eichelberger and Hughes of the removal of the case from the trial docket for February 9, 1987. Doctors Eichelberger and Hughes were denied their right to a jury trial. The post answer default judgment was rendered without an opportunity to be heard before a jury. Yet notice and an opportunity to be heard, before property is taken, is the basic requirement of the Due Process Clause. *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971).

The argument is sound that if rendering a judgment without notice violates the Fourteenth Amendment, restricting an individual's ability to attack that judgment by closing access to the courts to him must also violate the Fourteenth Amendment. Added to the deprivation of the access to the courts is the additional sin of punishing appellants for daring to seek redress of a void judgment. Such actions violate the First and Fourteenth Amendments to the Constitution and renders any judgment obtained by such procedural irregularities void. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980). It is not entitled to enforcement in the rendering state or any other state. *Hanson v. Deneckla,* 357 U.S. 250 (1958). Since the Constitution precludes a state from enforcing any such judgment, *a fortiori* no state can place conditions on an individual's right to obtain relief from such a judgment. As a result of the post answer default judgment obtained by fraud on the courts, and gross procedural irregularities, Doctors Eichelberger and Hughes have been driven into bankruptcy, deprived of their properties, including their interest in their pension plans (in spite of this Court's decision in *Shumate v. Patterson,* 112 S. Ct. 2242 (1992)), good name, reputation, integrity, and belief in the judicial system.

2. The number and depth of procedural irregularities in the bill of review proceedings also constitute a denial of Doctors Eichelberger and Hughes' constitutional rights. At the bill of review proceedings pertaining to the bill of exceptions and the hearing on the motion to dismiss, Doctors Eichelberger and Hughes were denied the right to be heard. Doctors Eichelberger and Hughes offered proof that they receive no notice of a trial setting in Cause No. 79-26873 for November 17, 1986. It was an impossibility because there never a trial setting in Cause 79-26873. Respondents were not required to produce proof that Doctors Eichelberger and Hughes were ever served with notice or proof of a trial setting in Cause No. 79-26873 for November 17, 1986.

Rules 243, 245, and 247 of the Texas Rules of Civil Procedure

were not complied with. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. *Carey v. Piphus,* 98 S. Ct. 1042, 1050 (1978). Mere lack of due care by a state official may unconstitutionally deprive an individual of life, liberty, or property under the Fourteenth Amendment. *Daniels v. Williams,* 106 S. Ct. 662 (1986). The object of the rules of procedure is "to obtain a just, fair, equitable and impartial adjudication of the litigants." *Smirl v. Glove Lab., Inc.,* 188 S.W. 2d 676, 678 (Texas 1945).

This Court has held that procedural irregularities will result in the denial of due process where the defects are so unfair as to deprive the proceedings of vitality. *Eagles v. United States,* 329 U.S. 314 (1948). The Fifth Circuit has recognized that a combination of procedural errors can reach a level that renders a judgment void for want of due process. *Bass v. Hoagland,* 172 F.2d 205, 209 (5th Cir. 1948), *cert denied,* 338 U.S. 816 (1949).

This Court has consistently stated that the Fourteenth Amendment requires judicial proceedings to be conducted in a fundamentally fair manner. *Lassiter v. Department of Social Service of Durham City,* 452 U.S. 18, 33 (1981). In 1983, this Court stated that errors in state law can rise to a level where they deprive an individual litigant of his federal constitutional rights. *Barclay v. Florida,* 436 U.S. 940, 956 (1983).

The First and Fourteenth Court of Appeals ignore their own decisions and have issued inconsistent opinions and opinions that directly contravenes this Court's precedents. An inability to know how the law will be decided in each particular case in spite of precedents established by this Court and the Texas Supreme Court violates a party's constitutional rights of due process and equal protection under the Fourteenth Amendment of the United States Constitution.

The proceedings and actions complained of here cannot be characterized as fundamentally fair where virtually every rule or law designed to protect a person from deprivation by mistake, bias or prejudice is violated or ignored.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted and after review of the petition summary reversal of the district court's order of dismissal with prejudice.

Respectfully submitted,

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APPENDIX A — OVERRULING OF APPELLANTS' MOTION FOR REHEARING IN THE SUPREME COURT OF TEXAS DATED JUNE 16, 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 16, 1993

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RE: Case No. D-3315

Style: P.T. EICHELBERGER, JR., M.D., and LOUIS B. HUGHES, M.D. v. JULES BALETTE, M.D., ET AL.,

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk
by s/ Courtland Crocker
Courtland Crocker
Deputy

APPENDIX B — REFUSAL OF APPELLANTS' APPLICATION FOR WRIT OF ERROR IN THE SUPREME COURT OF TEXAS DATED MAY 19, 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 19, 1993

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RE: Case No. D-3315

Style: P.T. EICHELBERGER, JR., M.D., and LOUIS B. HUGHES, M.D. v. JULES BALETTE, M.D., ET AL.,

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as supplemented, with the notation, "Writ Denied." Request for judicial notice is overruled.

Appendix B

Sincerely,

John T. Adams, Clerk
by s/ Blanca Morin
Blanca Morin, Deputy

APPENDIX C — OVERRULING OF APPELLANTS' MOTION FOR REHEARING IN THE FOURTEENTH COURT OF APPEALS DATED DECEMBER 3, 1992

FOURTEENTH COURT OF APPEALS

1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
Chief Justice

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
Justices

MARY JANE SMART
Clerk

HELEN A. CASSIDY
Chief Staff Attorney

PHONE
713-655-2800

FAX
713-650-8550

December 3, 1992

Hon. Reba A. Eichelberger
4201 Garth Road
Suite 111
Baytown, TX 77521

Hon. Norman Riedmueller
Riedmueller & Associates
12 Greenway Plaza
Suite 909
Houston, TX 77046

Appendix C

RE: CASE NO. 14-91-00879-CV
TRIAL COURT CASE NO. 90-59762

STYLE: Eichelberger, Jr., P.T., M.D., and Hughes, Louis B., M.D. v. Balette, Jules M.D. Et Al

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause. Further, application for writ of error, if any, must be submitted on or before Monday, January 4, 1993.

MARY JANE SMART, CLERK

By s/ Charlene Mitchell
Chief Deputy

APPENDIX D — OPINION AND JUDGMENT OF THE FOURTEENTH COURT OF APPEALS FILED NOVEMBER 5, 1992

Affirmed and Opinion filed November 5, 1992

THE STATE OF TEXAS

In The

Fourteenth Court of Appeals

NO. C14-91-00879-CV

PHILLIP T. EICHELBERGER, JR., M.D. and LOUIS B. HUGHES, M.D.,

Appellants

V.

JULES BALETTE, M.D., ET AL.,

Appellees

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 85-26017

OPINION

Appellants appeal from the trial court's dismissal of their second amended petition for bill of review. Appellants bring five points of error. We affirm the trial court's dismissal.

Appellants' original petition for bill of review was filed in November, 1990. Appellants alleged that the final judgment entered in Cause No. 79-26873 on December 8, 1986 should be set

aside on grounds that appellants did not have full notice of and participation in the proceedings leading to the judgment. Appellees filed ten special exceptions to the pleadings in the original petition for bill of review. These exceptions were sustained by the trial court and appellants were ordered to replead by March 11, 1991 to cure the defects in the original petition for bill of review as set forth in the special exceptions. Appellants filed their first amended petition for bill of review on March 11, 1991. On March 28, 1991 appellees filed a motion to dismiss the first amended petition for bill of review. One of the grounds for said motion was that appellants had failed in their first amended petition for bill of review to cure the pleading defects in the original petition. The motion to dismiss was heard on May 31, 1991. On that same day appellants filed their second amended petition for bill of review. At the conclusion of the hearing on the motion to dismiss the trial court sustained the motion and dismissed the case.

The issue of whether appellants participated in the trial of the case that resulted in post-answer default judgment against the appellants has already been decided against appellants twice in previous rulings by the First Court of Appeals of Houston. *P.T. Eichelberger, Jr., et al v. Hon. Marsha Anthony, Judge, 334th Dist. Court of Harris County,* 731 S.W.2d 719 (Tex. App. — Houston [1st Dist.] 1987); *P.T. Eichelberger, Jr. et al v. Houston Northshore Properties, et al,* decided by the Houston Court of Appeals in an unpublished opinion in 1988 in Cause No. 91-87-00468.

Each time this issue was litigated in the Houston Court of Appeals for the First District the court held that appellants were well aware of the trial setting and failed to appear. The opinions have noted that the lengthy record demonstrates that appellants were constantly trying to manipulate the court for the single purpose of seeking a more favorable forum.

Appendix D

Appellants argue in their first point of error that the trial court erred in failing to file findings of fact and conclusions of law as requested. Appellants rely on TEX. R. CIV. P. 296 as authority for this point of error. This rule is applicable to cases "tried in the district court without a jury." This case was not tried. It was dismissed without a trial. The trial court was not required to file findings of fact and conclusions of law in this case. *Statler Hotels v. Herbert Rosenthal Jewelry Corp.*, 351 S.W.2d 579, 582 (Tex. Civ. App. — Dallas 1961, writ ref'd n.r.e.); *see also Johnson v. J.W. Construction Co.*, 717 S.W.2d 464, 467 (Tex. App. — Fort Worth 1986, no writ); *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934, 937 (Tex. App. — Dallas 1982 writ ref'd n.r.e.). Appellants' first point of error is overruled.

Appellants argue in the second point of error that the trial court erred in granting appellees' motion to dismiss because it deprived appellants of their right to present evidence. Appellants argue in their third point of error that the trial court erred in granting appellees' motion to dismiss because a motion to dismiss is not a proper procedural method for the summary dismissal of appellants' cause of action. Appellants group the second and third points of error together in the brief and present no argument on the second point of error. Appellants concede that the grounds for the trial court's dismissal were two-fold: 1) the failure of appellants to amend their petition to cure the defects as set forth in the special exceptions; and 2) appellants' failure to have two parties served. Neither of these grounds create situations in which the presentation of evidence would have been appropriate. Appellants' second point of error is overruled.

Appellants third point of error contends that the dismissal of the cause of action for appellants' failure to cure the defects in their petitions was improper. They argue that a motion for summary

judgment is the proper pleading to be filed on appellants' failure to properly amend their petition for bill of review. The law in this area is well established. The petitioner has two options when special exceptions to a petition are sustained: either amend the pleading to meet the exception or refuse to amend. *Davis v. Quality Test Control*, 641 S.W.2d 324, 328 (Tex. App. — Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 823 (Tex. Civ. App. — Corpus Christi 1978, writ ref'd n.r.e.). If a party either refuses to amend or amends but does not cure defects in the pleading, an order dismissing the case is proper and the party then must test the trial court's ruling on appeal. *Id.* Dismissal of the action was the proper procedural method for the trial court to employ in disposing of this case.

Appellants make other arguments under their third point of error. It is not necessary to discuss those arguments in view of our decision that the trial court properly dismissed the case for failure to file amended pleadings to cure defects in their pleadings.

In a fourth point of error appellants argue that the trial court erred in dismissing appellants' case with prejudice because a dismissal for want of prosecution is not an adjudication on the merits. This case was not dismissed for want of prosecution. It was dismissed on failure of appellants to cure defects in their pleadings by amended pleadings. Appellants' fourth point of error is overruled.

In their fifth point of error appellants contend the trial court erred in dismissing the amended petition for bill of review because "plaintiffs fully satisfied the U.S. and Supreme Court requirements for a bill of review."

It is impossible to determine the gist of appellants' fifth point

of error. The argument under that point touches upon (a) lack of findings and conclusions; (b) the absence of two defendants; (c) service of process upon a partnership; (d) timeliness of filing an amended pleading; and (e) rule-making authority of the Texas Supreme Court.

None of these matters is pertinent to this appeal, except possibly the untimeliness point. As pointed out hereinabove the appellants' first amended petition for bill of review was filed on March 11, 1991. This filing was timely. The second amended petition for bill of review was not filed until May 31, 1991 the day of the hearing on the motion to dismiss. The second amended petition for bill of review was not timely filed, contrary to appellants' contentions. However, there is no indication in the record that the trial court did not consider the second amended petition at the time the motion to dismiss was heard, which was the same day the second amended petition for bill of review was filed.

We should note that appellants have brought no point of error claiming that the pleadings in either the first or second amended petitions for bill of review cured the defects in the pleadings. At no point in their brief do appellants even identify the special exceptions that had been sustained. The fifth point of error is overruled.

Appellees have requested this court in accord with Tex. R. App. P. 84 to award each appellee an amount not to exceed ten times the total taxable costs as damages against each appellant.

We find that appellants have taken an appeal in this cause for delay and without sufficient cause, and the court hereby awards to each appellee $250 against each appellant as damages.

Appendix D

The judgment of the court below is affirmed. Additionally appellees are awarded damages against appellants in accordance with this opinion.

/s/ William E. Junell
Justice

Judgment rendered and Opinion filed November 5, 1992.

Panel consists of Justices Junell, Robertson and Draughn.

Publish-Tex. R. App. P. 90.

Appendix D

THE STATE OF TEXAS

The Fourteenth Court of Appeals

No. C14-91-00879-CV

PHILLIP T. EICHELBERGER, JR., M.D. and LOUIS B. HUGHES, M.D.,

Appellants

V.

JULES BALETTE, M.D., ET AL.,

Appellees

JUDGMENT

This cause, an appeal from a judgment in favor of appellees dismissing appellants' petition for bill of review, signed May 31, 1991, came on to be heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below AFFIRMED.

This court finds that appellants, Phillip T. Eichelberger, Jr., M.D. and Louis B. Hughes, M.D. have taken an appeal in this cause for delay and without sufficient cause; therefore, this court renders the following awards in favor of each appellee as damages against each appellant.

Jules Balette, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

Appendix D

Donald Chalmers, D.D.S. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

C.D. Delery, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

Clarence O. Dube, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

William H. Fagan, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

Eugene Fonteno, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

Charles Hill, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

Charles M. Howard, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

Glen E. Keller, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

Edward Roberson, M.D. is awarded judgment against Phillip

T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

E.O. Smith, M.D. is awarded judgment against Phillip T. Eichelberger, Jr., M.D. in the amount of $250.00, and against Louis B. Hughes, M.D. in the amount of $250.00.

We order Phillip T. Eichelberger, Jr., M.D. and Louis B. Hughes, M.D., jointly and severally to pay all costs incurred by reason of this appeal. This decision is ordered certified below for observance.

APPENDIX E — ORDER OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 334TH JUDICIAL DISTRICT DATED MAY 31, 1991

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

NO. 90-59762

P.T. EICHELBERGER, JR. and LOUIS B. HUGHES

v.

JULES BALETTE, M.D., et al.

ORDER

On this day came on to be considered Defendant's Motion to Dismiss and the Court, upon reviewing the papers and pleadings filed herein and upon considering the arguments of counsel, is of the opinion that good cause exists for the granting of said Motion. It is accordingly

ORDERED that Defendant's Motion to Dismiss is GRANTED and this cause is DISMISSED WITH PREJUDICE. All costs of Court are taxed against Plaintiffs jointly and severally,

SIGNED this the 31st day of May, 1991.

s/ Russell Lloyd
Honorable Russell P. Lloyd
Judge Presiding

APPENDIX F — FINAL JUDGMENT OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 334TH JUDICIAL DISTRICT DATED DECEMBER 8, 1986

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

No. 79-26873
(Consolidated with No. 85-25994 and No. 85-26017)

DOUGLAS AYCOCK, M.D., et al.,

Plaintiffs,

v.

WENTWORTH G. EATON, M.D., et al.,

Defendants,

and

LOUIS B. HUGHES, M.D. and
PHILLIP T. EICHELBERGER, JR., M.D.,

Intervenors.

FINAL JUDGMENT

The above-styled and numbered cause came on for trial before this Court on November 17, 1985 pursuant to the Temporary Injunction Order rendered by the Court on May 8, 1986. Plaintiffs EDWARD ROBERSON, M.D., WILLIAM FAGAN, M.D., CHARLES HOWARD, M.D., JULES BALETTE, M.D., DONALD CHALMERS, D.D.S., C. D. DELERY, M.D.,

Appendix F

CLARENCE O. DUBE, M.D., EUGENE FONTENOT, M.D., CHARLES HILL, M.D., GLEN E. KELLER, M.D., and E. O. SMITH, M.D., individually and d/b/a HOUSTON NORTH PROPERTIES, a Texas partnership, appeared in person and by their attorneys. Defendants LOUIS B. HUGHES, M.D. and PHILLIP T. EICHELBERGER, JR., M.D., though properly notified pursuant to the Texas Rules of Civil Procedure and by the setting in said Temporary Injunction, wholly failed and refused to appear either in person or through their attorneys. The cause accordingly proceeded to trial during the course of which time a Motion was filed on behalf of said LOUIS B. HUGHES, M.D., and PHILLIP T. EICHELBERGER, JR., M.D., to recuse the undersigned; and the Court, finding that said Motion (i) was not requested to be heard or set for hearing, (ii) sought only voluntary recusal, which the Court declined, (iii) was not timely filed pursuant to Tex.R.Civ.P. 18a(a), and (iv) did not present Constitutional grounds for recusal or disqualification, and further finding that there was good cause for the Court to take further action pursuant to Tex.R.Civ.P. 18a(d) inasmuch as the case was then in trial, proceeded as indicated; pursuant to the Court's order severing the injunctive portions of consolidated Cause No. 79-26873-B, the following is entered.

On motion for entry of default judgment by Plaintiffs and after presentation of the evidence and argument of counsel, the Court finds that Plaintiffs are entitled to the relief set forth below.

It is therefore ORDERED, ADJUDGED and DECREED:

1. That Plaintiffs EDWARD ROBERSON, M.D. WILLIAM FAGAN, M.D., CHARLES HOWARD, M.D., JULES BALETTE, M.D., DONALD CHALMERS, D.D.S., C. D. DELERY, M.D., CLARENCE O. DUBE, M.D., EUGENE FONTENOT, M.D.,

Appendix F

CHARLES HILL, M.D., GLEN E. KELLER, M.D., and E. O. SMITH, M.D., individually and d/b/a HOUSTON NORTH PROPERTIES, a Texas partnership, jointly, recover from Defendants LOUIS B. HUGHES, M.D. and PHILLIP T. EICHELBERGER, JR., M.D., jointly and severally, the sum of FIVE HUNDRED NINETY THOUSAND THREE HUNDRED FOURTEEN AND 35/100 DOLLARS ($590,314.35), with interest thereon at the rate of ten percent (10%) per annum from December 5, 1986 until paid.

2. That costs of suit not taxed by any previous Order or Judgment be taxed against Defendants, LOUIS B. HUGHES, M.D. and PHILLIP T. EICHELBERGER, JR., M.D., jointly and severally, including the sum of ONE THOUSAND SIX HUNDRED AND NO/100 DOLLARS ($1,600.00) to TOM POST, Receiver.

It is further ORDERED, ADJUDGED ad DECREED pursuant to Rule 46(c) of the Texas Rules of Appellate Procedure on the motion of the Court and the Official Court Reporter of this Court that the bond for costs on any appeal herefrom shall be and is hereby set at NINE THOUSAND SIX HUNDRED AND NO/100 DOLLARS ($9,600.00), as to all claims or causes of action asserted against them, for all of which let execution issue if the same is not timely paid.

SIGNED this 8th day of December, 1986.

s/ Marsha Anthony
JUDGE PRESIDING

Appendix F

CERTIFICATE OF LAST KNOWN ADDRESS

I, NORMAN RIEDMUELLER, do hereby certify that the last known mailing addresses of Intervenors, to my knowledge and belief, are as follows:

Louis B. Hughes, M.D.
One Price Street
Baytown, Texas
or
1800 Southwood
Baytown, Texas

Phillip T. Eichelberger, Jr., M.D.
1610 Bowie School Drive
Baytown, Texas 77520

s/ Norman Riedmueller
NORMAN RIEDMUELLER

APPENDIX G — OPINION OF THE COURT OF APPEALS FIRST SUPREME JUDICIAL DISTRICT

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT

NO. 01-86-0665-CV

HOUSTON NORTH PROPERTIES, ET AL.,

APPELLANTS

V.

P.T. EICHELBERGER, JR., M.D., AND LOUIS B. HUGHES, M.D.,

APPELLEES

On Appeal from the 295th District Court of Harris County, Texas
Trial Court Cause No. 79-26873 (cons.)

This is an appeal from interlocutory orders enjoining disbursement of partnership and corporate assets and appointing a receiver over them.

In July of 1971, several individuals executed a partnership agreement to form a Texas general partnership called Houston North Properties ("H.N.P."). Later, HNP acquired a 57 acre tract of land in northwest Houston.

The original partners of HNP formed a second partnership, Houston North Hospital Properties ("HNHP"), which purchased 11 acres from HNP for construction of a hospital and medical center, i.e., the Houston Northwest Medical Center. A third entity, Houston Northwest Medical Center, Inc. ("HNMC"), was formed to manage the hospital. All three entities had essentially the same

owners, including appellees, Doctors P.T. Eichelberger, Jr. and Louis B. Hughes ("the doctors"). HNHP is not a party to this suit, and HNMC was dissolved and became known as Houston Northwest Medical Center Survivor, Inc. ("the corporation").

In 1974, because of severe financial difficulties, HNHP permitted eight new investors to purchase a 1% ownership interest in HNHP. These new partners did not assume the existing liabilities of HNHP and were not required to practice at the clinic or use the hospital. This exemption to the new investors apparently caused internal problems, and by 1983, HNHP had been sold to Republic Health Corporation along with all of HNP's remaining acreage.

This case comes to us with a lengthy litigious history. Portions of the parties' dispute have been resolved in *Hughes v. Aycock. et al.*, 598 S.W. 2d 370 (Tex. Civ. App. — Houston [14th Dist.] 1980, writ ref'd n.r.e.), and in *Hughes v. Houston Northwest Medical Center, Inc.*, 680 S.W. 2d 838 (Tex. App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 106 S. Ct. 571 (1985).

Before us, however, is the single question of whether the trial court abused its discretion in either granting a temporary injunction or appointing a receiver, or both.

This dispute commenced when the doctors brought suit against Republic Health Corporation as purchaser of the remaining 24 acres of HNP property (Cause No. 85-26017, "the Republic Health case"), claiming that Republic Health Corporation was not a good faith purchaser of the property. The doctors also filed suit against the managing partners of HNP and HNHP alleging fraudulent conveyances of HNP property and requesting an accounting (Cause No. 85-25994). Intervention was also sought in both Cause No. 82-53331 and in Cause No. 79-26873, "the Eaton case."

Appendix G

The Eaton case involved a suit by HNP, HNHP, and most of the partners against the Eatons for breach of the partnership agreements. It was consolidated with the doctors' lawsuit in Cause No. 85-25994. The consolidated cases went to trial in the 334th District Court on April 4, 1986. During the trial, the doctors nonsuited their claims, alleging as the basis their inability to make adequate discovery. The counterclaims, which remained against the doctors, were tried to a jury, which was unable to render a verdict.

On April 7, 1986, the same day the doctors nonsuited their claims in the Eaton case, they filed an amended petition in the Republic Health case, then pending in the 295th District Court, bringing in most of the former partners, also parties to the Eaton case, as well as some new parties. In May 1986, when the amendment was discovered, the partners counterclaimed for injunctive relief from further litigation harassment. This injunction was granted by the 334th District Court on May 8, 1986, in Cause No. 85-26017 and no appeal was taken.

Pursuant to Harris County local rules requiring that a case be transferred to the court granting injunctive relief, the Republic Health case was transferred from the 295th District Court to the 334th District Court, the same court in which the Eaton case was pending. The 334th District Court then set the case for trial on November 17, 1986.

On August 4, 1986, the doctors filed a motion for the appointment of a receiver and for a temporary injunction. The motions were heard on August 6 by the 295th District Court, which on that date was the designated court to hear ancillary matters. The judge granted the doctors' request for a temporary injunction, prohibiting appellants from: (1) disbursing the assets of HNP and

the corporation; (2) transferring or destroying any books or records of both entities; and (3) obligating or indebting either entity in any manner until final judgment. The court also granted the doctors' request for the appointment of a receiver to take charge of all of the funds, assets, and securities of both entities, retained exclusive jurisdiction of the Republic Health case, and set it for trial on February 9, 1987. Finally, the court consolidated the Republic Health case with the Eaton case and transferred the Eaton case to the 295th District Court.

In their first point of error, appellants contend that there was no evidence to support the appointment of a receiver of the HNP partnership assets. Specifically, appellants assert that there is no evidence identifying any HNP asset and no evidence that any HNP asset is in present danger of being lost, removed, or materially injured. We agree.

Tex. Civ. Prac. & Rem. Code sec. 64.001 (Vernon 1986) provides:

> (a) A court of competent jurisdiction may appoint a receiver:
>
> . . .
>
> (3) in an action between partners or others jointly owning or interested in any property or fund;
>
> . . .
>
> (b) Under subsection (a) (1), (2), or (3), the receiver may be appointed on the application of

> the plaintiff in the action or another party. The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.

The appointment of a receiver is a harsh remedy that should only be exercised in extraordinary circumstances. *Parness v. Parness*, 560 S.W. 2d 181, 182 (Tex. Civ. App. — Dallas 1977, no writ); *Hughes v. Marshall National Bank*, 538 S.W. 2d 820, 824 (Tex. Civ. App. — Tyler 1976, writ dism'd). Only where the evidence shows that some serious injury to the applicant will result or is threatened will this drastic remedy be applied. *Id.* Furthermore, under the provisions of the statute, trial courts are without authority to appoint a receiver unless there is proof of a present danger of the subject property being lost, removed, or materially injured. *Hughes v. Marshall National Bank*, 538 S.W. 2d at 824.

In the instant case, there is no showing that if a receiver is not appointed, HNP property will be lost, removed, or materially injured. Dr. Eichelberger testified that he and Dr. Hughes each own a 1/15th interest in the HNP partnership. The sole real estate owned by HNP, the 57 acre tract purchased in 1971, has been sold, with the sale of the last 25 acres in 1983. Since that time the partnership has been in a state of dissolution.

Regarding other assets and funds, Dr. Eichelberger testified that it was his "belief" HNP funds were being used to pay legal and accounting fees without authorization. However, there was no evidence that any such payments were currently being made, nor any evidence that payments previously authorized by the Management Committee were made in derogation of the Partnership Agreement.

Finally, the doctors argued that they feared that attorney's fees would be paid from HNP assets pursuant to the recent trial in the Eaton Case. Again, only mere assertions were made, with no proof being presented that such fees were being paid or were contemplated.

The only remaining property involved here is HNP's books and business records. The doctors testified that these records had been moved from the ordinary place of business to the offices of Mr. Fox, the accountant for HNP. Dr. Eichelberger testified that he and Dr. Hughes had been denied access to the records except for one recent occasion.

It is patently clear to this Court that the doctors' main concern with the business records is their accessibility for discovery purposes. However, Tex. Civ. Prac. & Rem. Code sec. 64.001 does not authorize the appointment of a receiver for the inspection and copying of business records. *Hughes v. Marshall National Bank*, 538 S.W. 2d at 825. There is no evidence that the HNP business records were in danger of being lost, removed, or destroyed while in the possession of the HNP accountant. The Texas Rules of Civil Procedure provide other, and more appropriate, means for the protection and preservation of business records as evidence. *Id.*

We sustain appellants' first point of error.

In their second point, appellants assert that there was no evidence to support the appointment of a receiver over the corporation's assets.

The doctors assert that the appointment of a receiver over the corporation was made pursuant to both the Texas Civil Practice & Remedies Code and the Texas Business Corporation Act.

Appendix G

Tex. Civ. Prac. & Rem. Code sec 64.001(a)5 (Vernon 1986) provides that a court may appoint a receiver "for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights." No evidence was presented that brings this case within the requirements of section 64.001(a)(5).

Similarly, we find no evidence supporting the doctors' contention that the Tex. Bus. Corp. Act. Ann. art. 7.05 (Vernon 1986) is applicable. Dr. Eichelberger testified that both he and Dr. Hughes each owned 6,818 shares in HNMC; that the last shareholder's meeting was held in 1982, at which time the dissolution of HNMC was commenced, and that they each refused to cash their checks representing payment for their entire interest in HNMC. It is clear that, without a corporation or corporate assets, the provisions of article 7.05 are inapplicable.

We hold that the doctors' claim regarding the adequacy of the distribution of corporate assets can be satisfied by a money judgment.

We sustain appellants' second point of error.

In points of error three through five, appellants argue that the trial court erred in granting the injunction because the doctors failed in their burden of proving: (1) that they had a probable right of recovery; (2) that there was lacking an adequate remedy at law; and (3) that there was probable injury in the interim.

At a hearing on an application for a temporary injunction, the sole issue before the court is whether the applicant is entitled to preservation of the status quo pending a trial on the merits. "Status quo" has been defined as the last, actual, peaceable, non-contested status that preceded the pending controversy. *State v. Southwestern*

Bell Telephone Co., 526 S.W. 2d 526, 528 (Tex. 1975); *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 358 S.W. 2d 589 (1962).

To warrant issuance of a temporary injunction, the applicant must plead a cause of action and show a probable right on final trial to the relief sought and probable injury in the interim. *State v. Southwestern Bell Telephone, Co.*, 526 S.W. 2d at 528; *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W. 2d 754, 756 (Tex. App. — Houston [1st Dist.] 1982, no writ). The applicant must further show that no adequate legal remedy exists.

Once the applicant has established a probable right and probable injury, the determination of whether to issue a temporary injunction is within the sound discretion of the trial court. *Transport Company of Texas v. Robertson Transports*, 152 Tex. 551, 261 S.W. 2d 549 (1953); *Parks v. U.S. Home Corp.*, 652 S.W. 2d 479, 485 (Tex. App. — Houston [1st Dist.] 1983, writ dism'd). In determining whether there has been an abuse of discretion, this Court must draw all inferences from the evidence in the light most favorable to the trial court's judgment. *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W. 2d at 757.

In the instant case, nothing in the record indicates that there would be irreparable injury to the doctors if HNP and the corporation are allowed to continue their business as usual. No land remains in HNP's possession, and a disposition of the liquid assets remaining undistributed will not prejudice the doctors' chances of recovery on their primary cause of action. Therefore, we do not reach the question of whether the granting of the temporary injunction was an abuse of discretion, because the doctors have failed to establish their case as a matter of law. *Transport Company of Texas v. Robertson Transports*, 152 Tex. at 556, 261 S.W. 2d at 552. In fact, there is no evidence of any

disbursement of funds for any reason after 1983. Consequently, there is no showing of irreparable harm.

In order for a legal remedy to be adequate, it must give the applicant complete, final, and equal relief. *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W. 2d at 756. Each of the injuries alleged by the doctors in their pleadings can be readily satisfied by money damages. Accordingly, we conclude that it was an abuse of the trial court's discretion as a matter of law to grant the temporary injunction. We sustain appellants' third, fourth, and fifth points of error.

Because of our disposition of points of error one through five, we will not address points of error six through ten, which argue alternate reasons why the trial court erred in both granting the temporary injunction and appointing a receiver. Both orders of the trial court are vacated, and the cause is remanded.

s/ Kenneth M. Hoyt
Kenneth M. Hoyt
Justice

Do not publish, Tex. R. App. P. 90.

Justices Duggan and Levy sitting.

Houston. db

Judgment rendered and opinion delivered November 20, 1986

True Copy Attest:

s/ Kathryn Cox
Clerk of Court

APPENDIX H — TEMPORARY INJUNCTION ORDER OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 295TH JUDICIAL DISTRICT DATED AUGUST 8, 1986

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
295TH JUDICIAL DISTRICT

No. 79-26873

Aycock, et al

VS.

Eaton, et al

TEMPORARY INJUNCTION ORDER

On the 6th day of August, 1986, Movants Drs. L. B. Hughes and P. T. Eichelberger, Jr., in this cause, for a temporary injunction, and other relief, came on regularly for hearing this day, due notice having been given. All parties appeared in person or by their attorneys. On duly considering the evidence received and the argument of counsel, the Court finds and concludes that movants will probably prevail on the trial of the causes.

Defendants partners of Houston North Properties, a Texas General partnership, Houston North Properties, and its agents, employees and attorneys, herein intend to disburse, misapply and waste the assets and funds of Houston North Properties, immediately and as soon as possible and before the Court can render judgment in this cause, thereby altering the status quo and tending to make ineffectual a judgment in favor of Dr. Hughes and Eichelberger, in that funds and assets of Houston North Properties

will be wasted, disbursed and/or misapplied; and unless Defendant partners of Houston North Properties, Houston North Properties, its agents, employees and attorneys, are deterred from carrying out that intention, Movants Hughes and Eichelberger will be without any adequate remedy at law in that assets of Houston North Properties will be wasted, disbursed, and/or misapplied. The Houston North Properties partnership has had no regular partnership meetings, or held any management committee meetings since February, 1980. The books, records, and documents have been removed from the business office listed in the partnership agreement. The Houston North Properties partnership is in a state of dissolution and termination. Drs. Hughes and Eichelberger are general partners in Houston North Properties.

It is therefore ORDERED that Defendant Partners of Houston North Properties, Houston North Properties, its agents, employees and attorneys, be and are, hereby commanded forthwith to desist and refrain from:

1. Disbursing, spending, wasting, or conveying, any and all assets, securities, funds, and monies in their possession or under their control, directly or indirectly received now or in the future, by Houston North Properties.

2. Transferring, secreting, altering, and/or destroying any books, records, papers and/or documents of Houston North Properties.

3. Obligating, pledging, offering guarantees, or indebting Houston North Properties in any manner until final judgment in this cause is entered by this Court after trial on the merits.

Appendix H

It is further ORDERED that trial on the merits of this cause is ordered set for 9th day of February, 1987.

The clerk shall forthwith on the filing by movants Hughes and Eichelberger of the bond hereinafter required, and on approving the same according to the law, issue a temporary injunction in conformity with the law and the terms of this ORDER. This order shall not be effective unless and until Movants Hughes and Eichelberger execute and file with the Clerk a bond, in conformity with the law, in the amount of Five Thousand Dollars ($5000.00) in Cause No. 79-26873.

SIGNED THIS 8th day of August, 1986.

s/ Frank O. White
ANCILLARY PRESIDING JUDGE

APPENDIX I — ORDER OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 295TH JUDICIAL DISTRICT DATED AUGUST 8, 1986

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
295TH JUDICIAL DISTRICT

No. 79-26873
No. 85-26017

No. 79-26873

Aycock, et al
vs.

Eaton, et al

No. 85-26017

Eichelberger, et al vs. Republic Health et al

ORDER

IT IS HEREBY ORDERED, pursuant to Harris County District Courts Local Rule, that Cause No. 79-26873 and Cause No. 85-26017, were transferred to the 295th Judicial District Court of Harris County, Texas, effective August 4, 1986. This Court having heard oral testimony on a Temporary Restraining Order and having granted such relief in Cause No. 79-26873 and Cause No. 85-26017, on August 4, 1986.

IT IS FURTHER ORDERED that all hearing dates and submission dates in Cause No. 79-26873 and Cause No. 85-26017 will be rescheduled by the 295th Judicial Court of Harris County, Texas.

Appendix I

SIGNED: August 8, 1986

s/ Frank O. White
JUDGE FRANK O. WHITE
Ancillary Judge.

APPENDIX J — ORDER OF CONSOLIDATION OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 295TH JUDICIAL DISTRICT DATED AUGUST 8, 1986

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
295TH JUDICIAL DISTRICT

No. 79-26873
No. 85-26017

No. 79-26873

Aycock, et al

vs.

Eaton, et al

No. 85-26017

Eichelberger, et al

vs.

Republic Health, et al

ORDER OF CONSOLIDATION

On the 6th day of August, 1986, this matter having come on for hearing before the Court on the Application of Doctors Hughes and Eichelberger, for the consolidation of Cause No. 79-26873, entitled Aycock, et al vs. Eaton, et al and Cause No. 85-26017 entitled Eichelberger vs Republic Health et al. The parties having appeared, and the Court having read the pleadings, examined the evidence and heard the argument of counsel, finds the causes of

action pending before this court involve common questions of law and facts, and parties, and that the request for consolidation should be granted.

IT IS HEREBY ORDERED that Cause No. 79-26873 and Cause No. 85-26017 are ordered consolidated for all purposes.

SIGNED.

s/ Frank O. White
JUDGE FRANK O. WHITE

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
NOV 1 1993
OFFICE OF THE CLERK

No. 93-421

IN THE

Supreme Court of the United States

October Term, 1993

P. T. EICHELBERGER, JR., M.D.
and LOUIS B. HUGHES, M.D.,

Petitioners,

v.

JULES BALETTE, M.D., C. D. DELERY, M.D.,
C. O. DUBE, M.D., WILLIAM H. FAGAN, M.D.,
CHARLES HILL, M.D., CHARLES M. HOWARD, M.D.,
GLEN E. KELLER, M.D., EDWARD ROBERSON, M.D.,
and E. O. SMITH, M.D.,
Individually and Doing Business as
HOUSTON NORTH PROPERTIES,
a Texas Partnership,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NORMAN RIEDMUELLER
Attorney for Respondents

Norman Riedmueller, P. C. &
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12 Greenway Plaza, Suite 909
Houston, Texas 77046
(713) 965-9900

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Respondents are dissatisfied with Petitioners' statement of the questions presented.

1. Petitioners' first question[1] could only be presented if their bill of review case had proceeded, but is not presented by the proceedings which led to the dismissal below.

2. Petitioners' second question[2] is not addressed at any place in their Petition except on the first page. It is therefore not satisfactorily presented within the bounds of this Court's Rule 14.

---

[1] "Whether the Fourteenth Amendment allows a state to enforce a void judgment obtained without a trial setting or notice of the defendant."

[2] "Whether sanctioning a defendant for appealing an adverse judgment violates the First Amendment to the United States Constitution that prohibits the government from passing any law that restricts the rights of its citizens to petition those invested with the power of government for the redress of grievances."

PARTIES TO THE PROCEEDINGS

Petitioners are: P. T. Eichelberger, Jr., M.D. and Louis B. Hughes, M.D.

Respondents are: Jules Balette, M.D., C. D. Delery, M.D., Clarence O. Dube, M.D., William H. Fagan, M.D., Charles Hill, M.D., Charles M. Howard, M.D., Glen E. Keller, M.D., Edward Roberson, M.D., and E. O. Smith, M.D., Individually and d/b/a Houston North Properties, a Texas Partnership.

The Petition incorrectly identifies Donald Chalmers, D.D.S., and Eugene Fontenot, M.D. as parties. These doctors were named by Petitioners in their pleadings, but were never served with any process and never appeared in the case.

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OPINIONS AND JUDGMENTS BELOW

The "Opinions Below" section of the Petition identifies the opinions and judgments below in this case in a confusing manner — specifically, by interjecting an incomplete reference to the underlying case and by placing that reference out of chronological order. In the underlying case (the outcome of which is the ultimate target of this litigation), the judgments and opinions below were as follows:

State Trial Court — On December 8, 1986, the 334th Judicial District Court of Harris County, Texas, signed a final judgment in Cause No. 79-26873 (Consolidated) awarding these Respondents damages against these Petitioners. (Appendix F to Petition, p. 17a)

State Intermediate Appellate Court — On March 19, 1987, the Texas First Court of Appeals decided Cases Nos. 01-86-0943-CV and 01-86-0944-CV granting a writ of prohibition protecting the jurisdiction of the 334th Judicial District Court. (Appendix A hereto, p. 1a) On April 20, 1988, the Texas First Court of Appeals dismissed Petitioners' appeal by writ of error in Case No. 01-87-00468-CV (along with three others). (Appendices B1 and B2 hereto, pp. 8a, 15a)

State Highest Court — On May 10, 1989, the Supreme Court of Texas denied Petitioners' application for a writ of error in Case No. C7629. (Appendix C hereto, p. 17a) On September 13, 1989, that court overruled Petitioners' motion for rehearing. (Appendix D hereto, p. 18a)

The judgments and opinions below in this bill of review case were as follows:

State Trial Court — On May 31, 1991, the 334th Judicial District Court of Harris County, Texas, dismissed Cause No. 90-59762 with prejudice. (Appendix E to Petition, p. 16a)

State Intermediate Appellate Court — On November 5, 1992, the Texas Fourteenth Court of Appeals rendered an Opinion (first Appendix D to Petition, p. 7a) and a Judg-

ment (also Appendix D to Petition, p. 13a) in Case No. 14-91-00879-CV affirming the judgment of the trial court and awarding damages against Petitioners. On December 3, 1992, that court overruled Petitioners' motion for rehearing. (Appendix C to Petition, p. 5a)

State Highest Court — On May 19, 1993, the Supreme Court of Texas denied Petitioners' application for a writ of error in Case No. D3315. (Appendix B to Petition, p. 3a) On June 16, 1993, that court overruled Petitioners' motion for rehearing. (Appendix A to Petition, p. 1a)

OBJECTION TO JURISDICTION

The Petition states at page 3: "Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2)." There is no subsection (2) to § 1257 of Title 28 of the United States Code.

Before the 1988 amendment of 28 U.S.C. § 1257, it did have a subsection (2). However, that subsection gave this Court jurisdiction by appeal (not by writ of certiorari) of cases sustaining the validity of a state statute against a federal constitutional challenge. This is not such a case.

Had this Court's jurisdiction been invoked under 28 U.S.C. § 1257(a), it would still be lacking. This case certainly does not involve the validity of a treaty or statute of the United States. Nor does this case actually involve any title, right, privilege or immunity set up or claimed under the U.S. Constitution. Only by rehashing the 1986-89 underlying litigation can Petitioners even colorably raise any constitutional right. This bill of review litigation, commenced in 1990, presents no such issue.

STATEMENT OF THE CASE

Respondents perceive numerous misstatements of fact within Petitioners' Statement of the Case, as well as relevant omissions.

The most efficient method of dealing with the confusion thus wrought is to tell the story accurately.

As of April 7, 1986, Respondents and others were involved in a civil trial against Petitioners and others in the 334th Judicial District Court of Harris County, Texas. This was Cause No. 79-26873, then styled *"Douglas Aycock, M. D., et al. v. Wentworth G. Eaton, M. D. et al."* (the *"Eaton case"*). Petitioners were also then parties to a civil case pending in another Judicial District Court of Harris County, Texas — the 295th — to which Respondents were not parties. This was Cause No. 85-26017 styled *"P. T. Eichelberger and Louis B. Hughes v. Republic Health Corporation, et al."* (the "*Republic Health* case").

On April 7, 1986, two related things happened. Petitioners non-suited all of their claims in the *Eaton* case, which had gone to trial in the 334th Court the previous Friday. Earlier on April 7, 1986, Petitioners also filed new pleadings in the *Republic Health* case in the 295th Court. The new pleadings in the 295th Court brought Respondents into that case for the first time, but the claims pled were not materially different from the claims made against Respondents which Petitioners non-suited later that same day in the 334th Court. However, because Respondents and others had counterclaims against Petitioners, they remained parties to the trial in the 334th Court.

Petitioners took no steps to serve on Respondents the new pleadings in the *Republic Health* case in the 295th Court. In May of 1986, the amendment was discovered by happenstance. Respondents counterclaimed for injunctive relief against any more litigious harassment. This relief was granted on May 8, 1986, and the matter was set for trial for November 17, 1986.

In Harris County, Texas, there was a local rule for civil trial courts which caused cases to be transferred to a new court whenever emergency relief was granted by the ancillary judge, a rotating position. By coincidence, the ancillary court for Harris County, Texas, in early May of 1986 (when Respondents acci-

dentally learned they had been re-sued in the 295th Court) was none other than the 334th — the same court in which the *Eaton* case was still in trial. When the May injunction was granted in the *Republic Health* case during an extended recess in the *Eaton* trial, the *Republic Health* case was transferred from the 295th Court to the 334th Court by operation of the local rules of Harris County. Petitioners attempted to appeal the May 1986, temporary injunction, but without success.

The trial of the *Eaton* case continued in the 334th Court. After the evidence closed, the original defendants (the Eatons) made a settlement. The case went to the jury only on issues regarding the counterclaims against Petitioners. The jury was unable to agree on a verdict, resulting in a mistrial.

Respondent Houston North Properties ("HNP"), a land partnership in which Petitioners were still members, had owned nothing since at least 1983. As of the summer of 1986, when the mistrial occurred, HNP had no business to conduct. For three years, nothing new could have occurred for Petitioners to complain about.

In August of 1986, the regularly-scheduled ancillary judge did not serve but the judge of the 295th Court assumed that position instead. Petitioners suddenly applied for emergency relief from the new ancillary court, the 295th Court, which was granted, in August of 1986. (Appendix H to Petition, p. 30a) This set the stage for an open conflict over whether the now-consolidated *Eaton/Republic Health* cases were within the jurisdiction of the 334th or the 295th Judicial District Court of Harris County, Texas.

The ensuing events have been the subject of **three** appellate proceedings. Each proceeding resulted in a decision in favor of Respondents and against Petitioners.

The receivership and injunction orders of the 295th Court in favor of Petitioners were immediately subjected to an interlocu-

tory appeal and set aside. (Appendix G to Petition, p. 4a) The appellate court held that there was no evidence to support the granting of injunctive relief or the appointment of a receiver, as the 295th Court had done. The appellate court noted that nothing in the record indicated any threat of irreparable injury. It held: "Accordingly, we conclude that it was an abuse of the trial court's discretion as a matter of law to grant the temporary injunction." Every point of error raised against Petitioners and addressed by the court of appeals was sustained. By operation of law, jurisdiction in the matter belonged to the 334th Court.

The decision described above was rendered on November 20, 1986. By that time, the consolidated litigation had been called to trial in the 334th Court pursuant to the trial setting dating back to the previous summer. Petitioners boycotted the trial proceedings, gambling that the improper exercise of jurisdiction in the matter by the 295th Court would protect them.

The 1986 appellate decision apparently had no effect on either Petitioners or the judge of the 295th Court, which boldly continued to act as if it had jurisdiction over the case. The sorry state of affairs thereby resulting is detailed in *Houston North Properties v. White*, 731 S.W.2d 719 (Tex. App.—Houston [1st Dist.] 1987). (Appendix A hereto, p. 1a) That decision, handed down in March of 1987, is the first appellate decision wherein the question of whether Petitioners had notice of the November, 1986, trial setting in the 334th Court was raised.

The question was correctly answered against Petitioners, as the court of appeals held that the 334th Court had acquired dominant jurisdiction to the exclusion of the 295th Court. The appellate opinion notes that the orders of the 295th Court were wrongful attempts to interfere with the jurisdiction of the 334th Court. The opinion observed: "It is patently clear that [Petitioners] Eichelberger and Hughes took a nonsuit of their claims in the consolidated cause, number 79-26873, for the single purpose of seeking a more favorable forum . . ." The court described Petitioners' con-

duct as "repugnant both to the rules of trial and appellate procedure, and to the spirit behind their enactment." The court of appeals conditionally issued a writ of prohibition resolving the jurisdictional conflict created by Petitioners.

Having thus failed to avoid the jurisdiction of the 334th Court, Petitioners proceeded to miss the deadline for perfecting an ordinary appeal from its judgments. One of the judgments awarded money damages against Petitioners in favor of Respondents, whom they had vexed with so much harassing litigation in earlier years. (Appendix F to Petition, p. 17a) That judgment is the same judgment attacked by the bill of review proceeding which led to the instant writ application.

Petitioners sought to appeal this money judgment against them by a writ of error. This effort was rejected by the Texas First Court of Appeals on April 20, 1988. (Appendix B1 hereto, p. 8a) Because of the Texas procedural requirements of an appeal by a writ of error, the issue again arose as to whether Petitioners were participants in the proceedings leading to the judgment sought to be appealed (and now attacked by this bill of review proceeding).

The First Court of Appeals not only held that Petitioners were aware of the trial setting at all times in question (citing their own 1987 decision on the subject) but also held:

> Furthermore, the voluminous record clearly illustrates that appellants (1) attempted to mire the parties and the courts in multiple lawsuits involving the same subject matter; (2) persistently attempted to wrest jurisdiction from the 334th District Court, in blatant defiance of this [the appellate] Court's rulings; and (3) deliberately refused to appear at the proceedings on November 24th and 25th in the 334th District Court, after this Court denied appellants' mandamus to prevent the 334th Court from proceeding to trial.

Consequently, the writs of error were dismissed. The Texas Supreme Court then denied relief in 1989. (Appendixes C and D hereto, pp. 17a, 18a)

Litigation between these parties was renewed in November of 1990, when the instant bill of review case and a related suit were filed by Petitioners. There were two prior appellate opinions holding that Petitioners had full and fair notice of the trial proceedings which produced the 1986 judgment now attacked. Despite this, Petitioners claimed that they had no notice of those proceedings and that the judgment was the product of some unspecified fraud on the part of Respondents or the courts or someone.

Respondents excepted to Petitioners' pleadings and further complained that Petitioners were seeking to set aside a joint and several money judgment without bringing into the case all the parties to the underlying judgment.

When Petitioners failed to compiy with the trial court's order to plead their case understandably and to bring in all the necessary parties, it was dismissed. (Appendix E to Petition, p. 16a) On appeal, the Texas Fourteenth Court of Appeals affirmed (Appendix D to Petition, p. 7a) and found that Petitioners had taken the appeal "for delay and without sufficient cause." (also Appendix D to Petition, p. 13a) The appellate court noted that Petitioners never even tried to show on appeal that their pleadings complied with the trial court's order. (Appendix D to Petition, p. 11a)

The Texas Supreme Court declined to consider the case. (Appendices B and A to Petition, pp. 3a and 1a) The instant writ application ensued.

REASONS FOR DENYING THE PETITION

No constitutional issues are legitimately raised in this case. The substance of the Petition is that the 1986 money judgment in Cause No. 79-26873 was the result of an unfair proceeding of which Petitioners had no notice and, thus, no opportunity to be heard. This argument has **twice** been rejected in appellate proceedings the result of which are in no way impugned now. In this case, the proceedings below present only issues regarding intelligible pleadings and joinder of necessary parties.

Petitioners invocation of *Peralta v. Heights Medical Center, Inc.*, 458 U.S. 80 (1988), is misplaced. The following material differences exist:

A. The record in *Peralta* showed that the party cast in judgment had no notice of the underlying proceedings attacked in the subsequent bill of review case. Here, the issue of Petitioners' notice of the underlying proceedings has been finally adjudicated against them twice and was completely irrelevant to the disposition of the subsequent bill of review case. The Petition states: "Doctors Eichelberger and Hughes have always contended that . . . they were never notified of a trial setting . . ." This is true, because they so contended in two prior proceedings, both now final, and lost both times.

B. In *Peralta,* the afflicted party had no prior opportunity to contest the default judgment against him. These Petitioners thoroughly contested the 1986 judgment against them.

C. The *Peralta* judgment was a naked default judgment. The 1986 judgment under attack here was not: Petitioners simply chose to absent themselves while wrongfully gambling that another court could and would protect them.

D. *Peralta* involved the tragedy of a party suffering material harm because of how the judgment against him was achieved. This harm could have been avoided (regardless of whether the claim sued upon was valid or not) if only Mr.

Peralta had known he was a party to the case. Petitioners present no such irreparable harm.

E. *Peralta* invalidated the "meritorious defense" element of Texas bill of review law as applied to the facts of that case. By no means were the grounds of dismissal of Petitioners' bill of review suit confined to their inability to plead a meritorious defense to the claims against them.

The root difficulty with the Petition in this case is this: Petitioners seek by this bill of review to re-litigate matters which were heard and determined earlier. The dismissal of the instant bill of review had nothing to do with those matters. There was no constitutional infirmity in the disposition of *this* case.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS OF TEXAS, HOUSTON (1ST DIST.)

Nos. 01-86-0943-CV, 01-86-0944-CV

OPINION ON APPLICATION FOR
WRITS OF PROHIBITION AND MANDAMUS
March 19, 1987

HOUSTON NORTH PROPERTIES, *et al.*,
Relators,

v.

THE HON. FRANK O. WHITE, JUDGE
295TH DISTRICT COURT OF HARRIS COUNTY,
Respondent.

P. T. EICHELBERGER, JR., *et al.*,
Relators,

v.

THE HON. MARSHA ANTHONY, JUDGE
334TH DISTRICT COURT OF HARRIS COUNTY,
Respondent.

Rehearing Overruled May 14, 1987

OPINION

HOYT, Justice.

ORIGINAL PROCEEDINGS ON WRITS OF PROHIBITION AND MANDAMUS

This case involves a controversy between two district courts concerning which court has jurisdiction over three related cases, trial court cause numbers 79-26873, 85-25994, and 85-26017. Relators, Houston North Properties and related parties (hereafter "Houston North Properties"), seek to have this Court prohibit 295th District Court Judge Frank 0. White from entering further orders concerning the parties' dispute and to compel him to withdraw orders that he has issued in connection with these cases. Relators, P.T. Eichelberger and Louis B. Hughes, seek a writ of mandamus to compel 334th District Court Judge Marsha Anthony to recuse herself or to refer a previously filed motion to recuse to the presiding judge of the administrative district.

This is a dispute with a lengthy, litigious history. Except as set out below, recitation of most of the facts are unnecessary to the disposition of these proceedings.

On August 8, 1986, at the request of Eichelberger and Hughes, Judge White entered an order appointing a receiver and enjoining disbursement of partnership and corporate assets that were the objects of the dispute. On appeal, that interlocutory order was dissolved by this Court, holding that Judge White abused his discretion. Further, we concluded that based on the pleadings and orders, Eichelberger and Hughes had invoked the jurisdiction of the 295th District Court only to help them in discovery. *Houston North Properties v. Eichelberger*, No. 01-86-665-CV (Nov. 20, 1986) (unpublished).

On November 17, 1986, the 334th District Court, presided over by Judge Anthony, proceeded to trial on the three cause numbers,

pursuant to her orders of May 8, 1986, setting the cases for trial and transferring all related cases to her court.

Eichelberger and Hughes, who at all times were aware of the trial setting, failed to appear for trial. Judge Anthony severed the claims of the parties not related to the Eichelberger's and Hughes' claims, and also severed the injunction orders and claims against Eichelberger and Hughes. The two cause numbers that concerned Eichelberger and Hughes, numbers 85-25994 and 85-26017, were reset to November 19 pending an inquiry as to the whereabouts of Eichelberger and Hughes.

In the meantime, Eichelberger and Hughes filed a motion to recuse Judge Anthony and set it for hearing before her on November 21. Notwithstanding, the cases proceeded to trial on November 19, and Judge Anthony signed judgments on November 25 and December 8. These judgments purported to dispose of all matters raised by Eichelberger and Hughes, assessed damages and attorney's fees against them, and made the temporary injunction prohibiting further suits by Eichelberger and Hughes a permanent one.

After this Court dissolved Judge White's interlocutory orders, on November 24, 1986, Judge White consolidated all cases remaining in Judge Anthony's court with the temporary injunction and appointment of receivership cause before him. He then proceeded to vacate all orders entered by Judge Anthony after August 4, 1986, the date that he heard the application for a temporary injunction and the appointment of a receiver.

Then, on December 16, 1986, Judge White called to trial the consolidated cases. The next day, Houston North Properties filed a motion for leave to file this petition for writ of prohibition with this Court. On December 18, Eichelberger and Hughes answered Houston North Properties' motion by filing the application for leave to file a petition for writ of mandamus.

This Court granted leave to file both petitions and ordered all proceedings involving these parties stayed in both trial courts.

This Court has jurisdiction to consider a petition for writ of prohibition because such a writ lies to prohibit parties from proceeding with suits that attempt to relitigate issues that were already the subject of judgments affecting the same parties. *Magnolia Petroleum Co. v. McLean*, 131 Tex. 585, 117 S.W.2d 417 (Tex.1938). Where the mere filing and prosecution of the second suit destroys the efficacy of a final judgment on a previous suit, a writ of prohibition is the proper form of relief. *United Gas Corp. v. Morrell*, 434 S.W.2d 697 (Tex.Civ.App.—Beaumont 1968, no writ). If the second court attempts to interfere with the prior action, this Court has the power to act by appropriate writ to settle the conflict of jurisdiction. *Curtis v. Gibbs*, 511 S.W.2d 263 (Tex.1974); *Cleveland v. Ward*, 116 Tex. 1, 285 S.W.2d 1063 (Tex.1926).

The court in which suit is first filed generally acquires dominant jurisdiction to the exclusion of other courts, *Curtis v. Gibbs*, 511 S.W.2d at 267, and no other court in which a subsequent suit is filed has the power to interfere. *Johnson v. Avery*, 414 S.W.2d 441 (Tex.1966). It is not enough, however, that a suit be filed first. To acquire dominant jurisdiction over a cause, "everything and everyone necessary for the court to resolve the dispute, except the evidence," must be before the court. *Grimes v. Harris*, 695 S.W.2d 648, 651 (Tex.App.—Dallas 1985, no writ).

The record in this case shows that the 334th District Court originally acquired jurisdiction over Eichelberger and Hughes when they intervened in the original suit, cause number 79-26873. All claims among the parties were consolidated for trial purposes. During trial of the consolidated cases, Eichelberger and Hughes nonsuited their claims, alleging as a basis, their inability to make adequate discovery. A new proceeding involving the same subject matter and parties was then filed in Judge White's court within days of the nonsuit. As previously noted, Judge Anthony had con-

solidated this new case with cases that were pending in her court. Those cases remained pending in her court because in the original suit, case number 79-26873, the jury had been unable to render a verdict, and because the Houston North Properties parties had petitioned for injunctions against Eichelberger's and Hughes' bringing any new suits.

We conclude that the 334th District Court was the first court in which suit was filed, and that it is the court of dominant jurisdiction.

Eichelberger and Hughes voluntarily submitted themselves to the jurisdiction of the 334th District Court by way of their intervention in the case early in the litigation among the parties, cause number 79-26873, and the subsequent, unobjected to consolidation with this case of a suit they had pending in the 55th Judicial District, cause number 85-25994. Additionally, the 334th District Court had before it "everything and everyone necessary for the court to resolve the dispute, except the evidence." *Id.*

Furthermore, Rule 1B(2) of the adopted and approved local Rules of the District Courts provides:

> If a case is filed in which there is a substantial identity of parties and causes of action as in a nonsuited case, the later case shall be assigned to the court where the prior case was pending.

Rules of the District Courts, vol. 2, 26-28 (special minutes of the District Courts of Harris County).

It is patently clear that Eichelberger and Hughes took a nonsuit of their claims in the consolidated cause, number 79-26873, for the single purpose of seeking a more favorable forum, even though they urged the inaccessibility of corporate records as the basis for the appointment of a receiver and for injunctive relief and for the nonsuit taken.

The local rules generally require that in a case that seeks injunctive relief, if the judge receives oral testimony, the case shall be transferred from the court in which it is pending to the court granting injunctive relief. Rule of the Harris County Civil Courts 8(C). However, by seeking the appointment of a receiver and the entry of a temporary injunction, Eichelberger's and Hughes' ultimate goal was to avoid the orders entered by Judge Anthony of the 334th District Court. This move to manipulate jurisdiction away from another district court is repugnant both to the rules of trial and appellate procedure, and to the spirit behind their enactment that dictates order and efficiency among courts with concurrent jurisdiction. This conduct is a threat to the independence and order of our judiciary. It must cease.

We hold that the 334th District Court has dominant jurisdiction of the parties and the claims, and that all orders entered by Judge White after May 8, 1986, were wrongful attempts to interfere with the 334th District Court's jurisdiction. We further hold that the orders and judgments entered by the 334th District Court constitute a valid and final resolution at the trial level of the disputes between the parties.

Finally, we address Eichelberger's and Hughes' petition to compel Judge Anthony to recuse herself. A motion to recuse must be timely filed before the mandatory provisions of Tex.R.Civ.P. 18a, which concern the hearing of motions to recuse, are triggered. *Linton v. State*, 632 S.W.2d 812, 815-816 (Tex.App.—Houston [14th Dist.], 1982, pet. ref'd). Unless a motion to recuse is timely filed, the mandatory provisions of Tex.R.Civ.P. 18a and Tex.R.Civ.Stat.Ann. art. 200a § 6 (now Tex. Gov't Code Ann. § 74.036(c)(3)) concerning hearing and referral of a motion to recuse do not come into play. *Petitt v. Laware*, 715 S.W.2d 688, 692 (Tex.App.—Houston [1st Dist.] 1986, no writ); *Gonzalez v. Gonzalez*, 659 S.W.2d 900, 901 (Tex.App.—El Paso 1983, no writ); *Autry v. Autry*, 646 S.W.2d 586 (Tex.App.—Tyler 1983, no writ). The motion to recuse was

filed November 19, two days after the trial began on November 17. The record does not indicate any justification for the late filing of the motion to recuse. We hold that the motion to recuse was untimely filed.

Accordingly, the following writ shall conditionally issue, and all others are denied. We grant Houston North Properties' request for a writ of prohibition and direct Judge Frank 0. White to take no further action with respect to consolidated cause numbers 79-26873, 85-25994, and 85-26017. We further order vacated any and all orders entered by him in this matter after May 8, 1986.

Writ will issue only in the event that the Judge White fails to comply with this order.

APPENDIX B1

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

No. 01-87-00468-CV
No. 01-87-00488-CV
No. 01-87-00489-CV
No. 01-87-00490-CV

OPINION ON APPEAL BY WRIT OF ERROR
April 20, 1988

P.T. EICHELBERGER, JR., M.D.,
AND LOUIS B. HUGHES, M.D.,

Appellants

v.

HOUSTON NORTH PROPERTIES, *et al.*,

Appellees

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause Nos. 79-26873, 79-26873(a)(b)(c)

OPINION

Appellants seek review of several post-answer default judgments by writ of error. A petition for writ of error must be (1) filed within six months of the signing of the final judgment; (2) by a party to the lawsuit; (3) who did not "participate" in the trial; and (4) the error must be apparent on the face of the record. *Stubbs v. Stubbs*, 685 S.W.2d 643, 644 (Tex. 1985). Appellees have filed a motion to dismiss the petition for writ of error, asserting that appellants' actions in the trial court constituted participation in the trial of the case.

The requirement of non-participation at trial is codified in Tex. R. App. P. 45(b):

> No party who participates either in person or by his attorney in the actual trial of the case in the trial court shall be entitled to review by the court of appeals through means of writ of error.

This provision that denies the right to use a petition for writ of error to review a judgment when a party participates in the trial is mandatory, jurisdictional, and cannot be waived. *Nutter v. Phares*, 523 S.W.2d 292 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

The Texas Supreme Court has defined "actual trial" as ordinarily understood to be the hearing in open court, leading up to the rendition of judgment on the questions of law and fact. *Lawyers Lloyd v. Webb*, 137 Tex. 107, 152 S.W.2d 1096 (1941). The extent of participation in the actual trial is a matter of degree, and the rule should be liberally construed to favor the right to appeal. *Stubbs*, 685 S.W.2d at 645. Participation includes taking part in all steps of a summary judgment proceeding except appearance at the hearing on the motion for summary judgment, *Norman v. Dallas Cowboys Football Club*, 665 S.W.2d 137 (Tex. App.—Dallas 1983, no writ), and confession of judgment by the attorney of record, *Lewis v. Beaver*, 588 S.W.2d 685 (Tex. Civ. App.— Houston [14th Dist.] 1979, writ ref'd n.r.e.). Filing an answer, *Phillips Petroleum Co. v. Bivins*, 423 S.W.2d 340 (Tex. Civ. App. 1967, writ ref'd n.r.e.), or a motion for new trial, *Lawyers Lloyd*, 152 S.W.2d at 1098, does not constitute participation, nor does the signing of a waiver of citation and agreement incident to divorce disqualify a party from pursuing a petition for writ of error under Tex. R. App. P. 45(b). *Stubbs*, 685 S.W.2d at 645.

Appellees rely on the case of *Thacker v. Thacker*, 496 S.W.2d 201 (Tex. Civ. App.—Amarillo 1973, writ dism'd), in support of their contention that appellants' conduct constituted participation in the trial court. There the court held that where the appellant elected to absent herself from a summary judgment hearing without a request for continuance, and had notice of the action taken by the court at the hearing, appellant should have reasonably availed herself of the shorter appeal period. The court dismissed the petition for writ of error, quoting the supreme court's opinion in *Lawyers Lloyd*:

> The legislative purpose was to take away the right of appeal by writ of error from those who should reasonably use the more speedy method of appeal. Those who participate in the trial leading up to the rendition of judgment are familiar with the record, and are therefore in position to prepare for appeal on short notice; whereas, those who do not so participate in the actual trial, and are therefore unfamiliar with the record, may need additional time in which to familiarize themselves with the record.

Thacker, 496 S.W.2d at 204.

The rationale of *Thacker* is applicable to the case before us; the facts of the instant case, however, cannot be analogized to any of the cases cited above. Because, here, the record reflects a degree of participation in the trial of these cases, that, in our experience, is unparalleled.

To assess the degree of participation by appellants in the trials of these cases, it is necessary to review the history of appellants' prolific lawsuits arising from a 1971 partnership agreement to acquire and operate a medical facility. Dates are approximate and facts are explicated in the cited cases:

> 1975 — Eichelberger and Hughes sue partners over their forced retirement from partnership; jury trial; judgment in favor of defendants; affirmed on appeal. *See Hughes v.*

Aycock, 598 S.W.2d 370 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.)

1982 — Eichelberger and Hughes sue corporation operating hospital and former partners; jury trial in 11th district court; judgment entered against appellants in the amount of $504,000; affirmed on appeal. *See Hughes v. Houston Northwest Medical Center, Inc.*, 680 S.W.2d 838 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) *cert. denied*, 106 S.Ct. 571 (1985).

1985 — Eichelberger and Hughes sue judge of 11th district court in federal court. Judge Bue dismisses as frivolous.

The record reflects that appellants, then, in 1985 embarked on a new round of litigation in several state district courts that resulted in the judgments that are before us here. Appellants' participation in those lawsuits is described below.

1985 — Appellants intervene in cause no. 79-26873; this was a suit by the partnership against a partner and his former wife for refusing to sell back the partnership interest awarded to the ex-wife in a property settlement, "the Eaton case."

Appellants sue partners and partnerships for accounting, breach of fiduciary duty, etc., in cause no. 85-25994, "the Houston North Properties case."

Appellants sue purchaser of partnership property, Republic Health Corporation in cause no. 85-26017, "the Republic case."

April 1986 — The Eaton case, consolidated with the Houston North Properties case, goes to trial in 334th district court. Appellants are present and participate. Several weeks into trial, they enter non-suit. On same day that appellants enter non-suit, they amend pleadings in the Republic case, pending in the 295th district court, to bring essentially the same claims against the same parties, and bringing in new parties.

May 1986 — Partners seek injunction to prevent further litigation harassment; 334th district court grants injunction after hearing in which appellants fully participated; trial date was set for November 17, 1986.

August 1986 — Appellants seek appointment of receiver and temporary injunction; 295th grants both and consolidates the Republic Health case with the Eaton case and transfers Eaton case to the 295th.

November 1986 — This Court vacates interlocutory orders and temporary injunction entered by the 295th district court in *Houston North Properties v. Eichelberger*, No. 01-86-0665-CV (Tex. App.—Houston [1st Dist.], Nov. 20, 1986, unpublished).

334th District court calls to trial the consolidated cases, the Eaton case, the Republic Health case and the Houston North Properties case on November 17, 1986. Appellants do not appear; trial court continues case to ensure appellants have notice.

Appellants seek mandamus in this Court to prevent 334th district court from proceeding to trial. This Court overrules appellants' request without opinion on November 20, 1986.

334th district court proceeds to hear testimony in the consolidated cases on November 24 and 25, 1986. Appellants, having notice, refuse to attend, and are present in 295th on motion for sanctions against appellees.

December 1986 — Final judgments are entered by 334th district court:

Judgment is entered in Republic Health case awarding attorneys' fees to appellees and assessing exemplary damages against appellants in amount of $590,000 for litigation costs of preceding 10 years. Judgment entered on December 8, 1986.

Houston North Properties case is severed and judgment dismissing for want of prosecution is entered, on December 8, 1986.

Permanent injunction enjoining appellants from further litigation against appellees entered on December 8, 1986.

Eaton case is severed and final judgment of settlement is entered on December 30, 1986.

Appellants failed to timely appeal the judgments and instead elected to pursue appeal by writ of error. Appellants fully participated in the temporary injunction hearing leading to trial in the 334th District Court, and were aware at all times of the trial setting. *See Houston North Properties v. White*, 731 S.W.2d 719, 720 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding). Furthermore, the voluminous record clearly illustrates that appellants (1) attempted to mire the parties and the courts in multiple lawsuits involving the same subject matter; (2) persistently attempted to wrest jurisdiction from the 334th District Court, in blatant defiance of this Court's rulings; and (3) deliberately refused to appear at the proceedings on November 24th and 25th in the 334th District Court, after this Court denied appellants' mandamus to prevent the 334th Court from proceeding to trial. Taken together, we conclude that the above conduct constitutes participation in the trial of the case, so as to preclude review by writ of error. *See Brandt v. Village Homes Inc.*, 466 S.W.2d 812, 815 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (writ dismissed where appellants' counsel, having notice, refused to be present at hearing on entry of judgment).

Appellees' motion to dismiss appellants' writs of error is granted. Appellants' writs of error are dismissed. All other pending motions in this matter are overruled.

/s/ JAMES F. WARREN

James F. Warren

Justices Duggan and Levy also participating.

Do Not Publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered: April 20, 1988

APPENDIX B2

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

No. 01-87-0468-CV
No. 01-87-0488-CV
No. 01-87-0489-CV
No. 01-87-0490-CV

JUDGMENT DISMISSING APPEAL
BY WRIT OF ERROR
April 20, 1988

P. T. EICHELBERGER, JR.,
AND LOUIS B. HUGHES,

Appellants

v.

HOUSTON NORTH PROPERTIES, *et al.*,

Appellees

Appeal from the 334th District Court of Harris County. (Tr. Ct. Nos. 79,26873, 79-26873(a)(b)(c)). Opinion delivered by Justice Warren, Justices Duggan and Levy sitting.

COPY OF JUDGMENT

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on December 8, 1987. After reviewing appellee's motion to dismiss and the record before the Court, it is the opinion of this Court that the motion should be granted, and that there was no error in the judgments. It is therefore CONSIDERED, ADJUDGED, AND ORDERED that the judgment of the court below be in all things affirmed.

It is further ordered that the appellants, P. T. EICHELBERGER, JR. and LOUIS B. HUGHES, pay all costs incurred by reason of this appeal.

It is further ORDERED that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Warren, Duggan and Levy.

Judgment entered April 20, 1988.

APPENDIX C

IN THE SUPREME COURT OF TEXAS

No. C-7629

ORDER DENYING APPLICATIONS
FOR WRIT OF ERROR
May 10, 1989

P. T. EICHELBERGER, JR., *et al.*

vs.

HOUSTON NORTH PROPERTIES, *et al.*

From Harris County, First District

Three applications for writ of error on behalf of P. T. Eichelberger, Jr. *et al.* to the Court of Appeals for the First District having been duly considered, and the Court having determined that the applications present no error of law, which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said applications be, and hereby are, denied.

It is further ordered that applicants, P. T. Eichelberger, Jr. *et al.*, and surety, Lawyers Surety Corporation, pay all costs incurred on each respective application.

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. C-7629

ORDER OVERRULING MOTION FOR REHEARING
OF APPLICATION FOR WRIT OF ERROR
September 13, 1989

P. T. EICHELBERGER, JR., *et al.*

vs.

HOUSTON NORTH PROPERTIES, *et al.*

From Harris County, First District

Petitioner/s motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.